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No. 962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

EDWARD J. DONOVAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Edward J. Donovan respectfully prays that a writ of certiorari issue to review the judgment of the Seventh Circuit entered in the above case on November 3, 1964.

OPINIONS BELOW

The opinion of the court below (Appendix C, p. 6aff, *infra*) is reported at 339 F.2d 404. The district court did not hand down any opinion.

JURISDICTION

The judgment of the court below was entered on November 3, 1964 Appendix D, p. 20a, *infra*). Petitions for rehearing duly filed by each the United States and the petitioner were denied on January 4, 1965 (Appendix E, p. 21a, *infra*). On January 29, 1965, the time within which to file a petition for a writ of certiorari was extended to and including March 5, 1965, by an order signed by Mr. Justice Clark. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

QUESTIONS PRESENTED

1. Whether the phrase "representative of any employees" as it appeared in Section 302(b) of the Labor Management Relations Act of 1947, prior to its amendment on September 14, 1959, included a president of a local union where there was no evidence that such local president had authority to, or in fact did, represent any employees for the purpose of dealing with their employer.

2. Whether the mere holding of the office of president of a local union creates a presumption of fact that such president is a "representative of any employees" sufficient to support a conviction in this case.

3. Whether the term "employer" as it appeared in Section 302(b) of the Labor Management Relations Act of 1947, prior to its amendment on September 14, 1959, included an association of employers which was not shown by any evidence to represent or to be authorized to represent its employer members in labor-management relations and which was not shown by any evidence to have more than one non-supervisory employee.

4. Whether the conviction of petitioner for receipt of payment from an "association of employers" prior to September 14, 1959 constituted a violation of the *ex post facto* prohibition, in view of the amendment of Section 302 on said date, whereby the term "employer" was, for the first time, explicated and broadened by adding specifically designated categories of proscribed payers including "associations of employers."

5. (If question No. 1 is answered in the affirmative)—Whether petitioner, as a union officer could be properly convicted under Counts 2 to 47 in the indictment which failed to inform him, as the accused, as to whether he was charged under one of the two subsections applicable in the disjunctive to union officers or under the one subsection applicable to a representative set forth in the 1959 amendment, in view of the fact that, if question No. 1 is answered in the affirmative, then, said 1959 amendment reduced the all inclusive scope of previously prohibited payments to a union officer to the specifically limited situations described in subsections 2 and 4 of amended Section 302(a), thereby abating criminal prosecution as to other conduct not covered by said subsections because such conduct was no longer illegal after said amendment.

STATUTES INVOLVED

The pertinent provisions of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. 140, *et seq.*, and of the amendments thereto made by the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401, *et seq.*, are set forth in Appendix A, *infra*, p. 1a.

STATEMENT OF THE CASE.

The petitioner, Edward J. Donovan, was prosecuted criminally under an indictment containing 74 counts, Count One charging a violation of the Federal Criminal Conspiracy Act, 62 Stat. 701, 18 U.S.C. 371, Counts 2 through 47 charging substantive violations of Section 302(b) of the Labor Management Relations Act of 1947, and Counts 48 through 74 charging substantive violations of Section 302(b) of the Labor Management Relations Act of 1947, as amended by Section 505 of the Labor-Management Reporting and Disclosure Act of 1959 (App. 11-15).[1] Count One was dismissed before trial on motion of the government. While only the convictions under Counts 2 through 47 were sustained by the court below, the infirmities in Counts 48 through 74 which necessitated the reversal of the convictions under these counts, are here relevant as we believe the same infirmities in addition to the points herein raised, require a reversal of the convictions under Counts 2 through 47.

THE INDICTMENT

Each of the counts of the indictment alleged that the United Film Carriers, Inc. (hereinafter referred to as United) was an unincorporated film association of persons and firms engaged in the motion picture film delivery business, that its members were employers, and that all the named employers and their agents on their behalf employed members of the Film, Radio, Television, Orchestra, Studio,

[1] The reference "App." is to the Appendix to Brief for Defendant-Appellant filed in the court below. Nine copies of this Appendix have been filed herein.

Theatrical, Exhibition, Amusement Park and Sound Truck Chauffeurs, Helpers and Warehousemen, Local Union 755, International Brotherhood of Teamsters, hereinafter referred to as Local 755 (App. 11-15).

Each of the counts of the indictment alleged that the petitioner, Edward J. Donovan, was an official of Local 755 and was a representative of the employees who were employed by the named employers (App. 11-15). Counts 2 through 47 each alleged that United was the agent of its employer members and was an employer as defined by Section 2 of the National Labor Relations Act and that petitioner Donovan received from United a sum of money in violation of Section 302(b) of the Labor Management Relations Act. Counts 48 through 73 differed from Counts 2 through 47 only in the omission of the allegation that United was the agent of its members and an employer, in respect to date, amount of money and the allegation in Counts 48 through 73 that the violation was of Section 302(b), as amended September 14, 1959 (App. 11-15). Count 74 was identical with Counts 48 through 73, except as to dates and except that it alleged the receipt of an automobile instead of money (App. 15).

THE MOTION TO DISMISS INDICTMENT

The petitioner Donovan moved to dismiss the indictment on various grounds several of which asserted that the indictment failed to inform the accused of the nature and cause of the accusation with the specificity required by law (App. 15), that Counts 1 through 47 attempted to enforce a criminal statute *ex post facto* (App. 15), and that the indictment failed to allege facts to show that United as a party or firm whose conduct was proscribed by Section 302(a) and (b) of the Labor Management Relations Act (App. 16).

All of the motions to dismiss the indictment were overruled (App. 4, 5).

THE EVIDENCE

At the beginning of the trial it was stipulated that Local 755 was a labor organization and that from January 1, 1958 through December, 1960 the petitioner Donovan held positions as an officer of Local 755, including president (App. 20-21).

During the period involved in the indictment United had only the following members, herein identified as route owners: William Swanson; James Hastings; William Rice; Albert Hasham and Packark Film Delivery; Josephine Katopes; Ward Doebler; Paul Barrata; and Lena Kolecamp (App. 23).

United existed for the purpose of scheduling the delivery services of the route owners, each of whom was engaged in the film delivery service. Each route owner engaged in delivering motion picture film and supplies to the theaters from various exchanges and then back to the exchanges. The exchanges were 20th Century Fox, Columbia Pictures, Warner Brothers, Loew's, Inc., Paramount Pictures, Universal Pictures, and National Screen Service (App. 21). The route owners would bring their theater bookings into United. Then it became the obligation of United to see to it that drivers hired by, or under contract with the route owner, or the route owner himself, picked up the proper picture at the proper time for delivery to the proper theater. It was also one of the functions of United to see to it that after the run of the film had concluded at a given time that the film was picked up from that theater and returned to the film exchange or released to a different route owner to take to a theater owner on his route (App. 27-28). United also acted as spokesman for the route owners in negotiating service rates to be

paid by the theaters to the route owners. Further, United serviced the route owners by helping them get new business, and in the collection of delinquent theater accounts (App. 31-32), as well as adjusting credit problems between the theaters and the film exchanges so that the route owners could deliver the films (App. 33-34). Thus, United acted as a kind of trade association.

Of the eight route owners who were members of United at any time covered by the indictment, none of them had in excess of one employee at any time covered by the indictment.[2]

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[2] William Swanson had only one employee (App. 73, 76).

James Hastings engaged only one truck driver who appears to have been an independent contractor rather than an employee (App. 82-84).

William Rice had one truck driver (App. 34-39).

Albert Hashman had no employees but his route was serviced by Ralph McLaughlin as an independent contractor (App. 39).

Josephine Katopes had one truck driver who made deliveries for her and appears to have been an independent contractor from his personal ownership of the delivery truck (App. 39).

Ward Doebler had no employees. Initially, he contracted out to Harold Hale who was neither a route owner nor an employee during the period covered by the indictment. Later the route was delivered by Ralph McLaughlin (App. 34, 35, 39).

Paul Barrata is shown by the evidence to have had no employees (App. 34).

Lena Kolecamp operated on a strict contractual relationship, at first with Harold Hale and later with Ralph McLaughlin (App. 34, 39, 77, 79).

Ralph McLaughlin was the only route owner whom the record identifies as having more than one employee. He owned six trucks and had six employees (App. 34, 36) but did not become a member of United until 1961 (App. 39), a year after the indictment period.

An independent contractor was expressly excluded by the Labor Management Relations Act from the category employee. Section 2 (2) of the National Labor Relations Act as amended, 29 U.S.C. 152(2).

United operated through its president, Ralph Packard, its office manager and dispatcher, Ralph McLaughlin, and one Joe Dion, an emergency man (App. 21-23). It is petitioner Donovan's contention that the exhibits and testimony show that he was also a regular employee of United, and that the payments to him were all regular wage payments. Since the government's case is predicated upon the absence of an employment relationship between United and petitioner Donovan, a determination that United had more than one nonsupervisory employee cannot include Donovan as an employee, or otherwise his conviction must be reversed because his receipt of money was wages which are permitted by Section 302(c).

There is no evidence that United was ever concerned in any manner, directly or indirectly, in any labor relations problems of its members. There is no evidence that United was ever authorized to do anything in connection with such matters. Nor is there any evidence that United ever dealt with petitioner Donovan as an officer of Local 755. To the question put to Ralph McLaughlin, office manager of United, as to whether he ever dealt with petitioner Donovan about wages or hours, he gave an unequivocal "No" in response (App. 26).

As hereinafter discussed in greater detail, the record is devoid of any evidence that petitioner Donovan was authorized to or did act as a representative of any employees in dealing with their employer.

From January 22, 1958 to July 1, 1960, 73 checks of United were delivered to petitioner Donovan. They appear on their face to be weekly pay checks. For the most part

they were in the same or similar amount, reflecting a standard salary, withholding and social security taxes and hospitalization payments.

VERDICT AND JUDGMENT

The jury found the petitioner Donovan guilty on Counts 2 through 74, inclusive. The court sentenced the petitioner Donovan to imprisonment for a period of one year on each of Counts 2 to 47, inclusive, said sentences to run concurrently with each other, imprisonment for a period of one year on each of Counts 48 to 73, inclusive, said sentences to run concurrently with each other, and consecutively to the sentence imposed on Counts 2 through 47, and imprisonment for one year and a fine of $5,000 on Count 74, said sentence of imprisonment to run consecutively to the sentence imposed under Counts 48 through 73 (App. 157).

PROCEEDINGS IN THE COURT OF APPEALS

Upon appeal to the United States Court of Appeals for the Seventh Circuit the court affirmed the convictions under Counts 2 through 47 and reversed the convictions under Counts 48 through 74 (p. 20a, *infra*). The reversal was based upon the court's holding that Counts 48 through 74 of the indictment, in view of the disjunctive provisions of Section 302(a) as amended, did not give the petitioner definite notice of the offense charged. Since each of these counts charged petitioner Donovan both as a representative of employees and as an officer of Local 755, these counts could be taken as charging the receipt of a payment proscribed by either subsection 1 or 2 or 4 of Section 302(a). These counts therefore charged petitioner in the

disjunctive with being guilty of one or of another of several offenses and were in this respect lacking in the certainty required of indictments (p. 12a, *infra*).

Counts 2 through 47, having relation to conduct occurring prior to the amendments to Section 302, were not regarded as lacking sufficient certainty. The court rejected the contention that Counts 2 through 47 were defective as containing an *ex post facto* crime in that they alleged the payment by an association of employers although it was not until the 1959 amendment that payments by an association of employers were proscribed (p. 10a, *infra*). The Court held that the allegations that United was the agent of its member route owners and also an employer of Local 755 members in its own right, rendered the indictment valid in this respect in view of the fact that employer was defined by Section 2(2) of the National Labor Relations Act as including any person acting as an agent of an employer, directly or indirectly (p. 10a, *infra.*)

The Court of Appeals rejected petitioner's contention that the term agent in Section 2(2) of the National Labor Relations Act and the term representative in Section 302(b) of the Labor Management Relations Act were limited to agency and representation in collective bargaining matters (p. 15a, *infra*).

In addition, with respect to the petitioner Donovan, the Court of Appeals held that the absence of any express showing that petitioner Donovan had authority to act in collective bargaining matters was immaterial because Donovan by reason of his office as president of Local 755 must be regarded to have some authority to act for employee-members of the labor organization in dealings with their employers. The Court stated it believed this conclusion "comports with the rationale of *United States* v. *Ryan*, 350 U.S. 299" (p. 15a, *infra*).

The Court of Appeals did not discuss petitioner's contention that neither United nor any of its member route owners had more than one employee within the meaning of Section 2(2) of the National Labor Relations Act in that Ralph McLaughlin would not count as an employee of United because of his supervisory status, and those delivering for route owners were independent contractors with possibly several exceptions, never amounting at best to more than one employee per route owner. The Court of Appeals clearly regarded Ralph J. McLaughlin as an employee for purposes of the statute because it recited that United had two members of Local 755 in its employ, one of whom was Ralph McLaughlin, its office manager (p. 13a, *infra*). The Court of Appeals likewise rejected the contention that the independent contractor status of the drivers for route owners excluded them from the employee category; when it stated without differentiation that "Some of the drivers employed by route owners were members of Local 755" (p. 14a, *infra*).

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit in this case on the following grounds:

1) Conviction of receipt by a union representative of payments from an "association of employers" prior to 1959, when such receipt was first made criminal is a clear violation of the *ex post facto* prohibition which requires the exercise of this Court's supervisory power to protect a constitutional guarantee.

2) The interpretation of a statutory amendment by the Seventh Circuit in this case is in direct conflict with the rules promulgated by this Court.

3) In two respects the decision below, in sustaining the convictions, construed the pre-September 1959 language of Section 302(b) of the Labor Management Relations Act of 1947 as embracing parties not expressly included therein but as to which Congress first made express provision for inclusion by its 1959 amendments, and even by the 1959 amendments not the all embracing inclusion which the Court below attributed to the earlier statute. Thus, the pre-September 1959 language did not state that associations of employers were within the prohibited class of payers nor that officers of unions as distinguished from representatives of employees were within the prohibited class of payees.

The 1959 amendments expanded the prohibited class of payers, in certain instances and under certain circumstances, to include associations (Section 302(a) as amended) and the prohibited class of payees, in certain instances and under certain circumstances, to include officers (Section 302(a)(2) and (4) as amended). The Court of Appeals, while wording its opinion to show appreciation that these changes in language could not be applied retroactively, nevertheless so construed the pre-September 1959 language as applied to the facts here involved so that all associations and all officers would have been within its terms although Congress, both by the amendments themselves and by their legislative history, showed it interpreted the prior language differently.

A comparison of the pre-September 1959 language with the post 1959 amendment language shows the language has been broadened. The original Section 302 language made no mention of payments by associations of employers or payments to officers of unions. The 1959 amendments include a new express prohibition of certain payments by any "association of employers" to any "officer" of any labor organization (in specifically described situations). Throughout the committee reports and debates preceding

enactment of these amendments these changes are described as expanding,[3] extending,[4] broadening,[5] and adding.[6]

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[3] S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess., p. 11, I Leg. His. LMRDA 407: "the committee bill expands section 302 to cover * * * also payments made to union officials with intent to influence them in the performance of" their duties.

[4] Statement of Secretary of Labor James P. Mitchell inserted in the Congressional Record, 105 Cong. Rec. 1732(1) II Leg. His. 995(3) describes the administration's bill as amending section 302 "so as to extend it to additional persons and types of payments."

The explanation of S. 748, 86th Cong., 1st Sess., prepared by the Department of Labor and inserted in the Congressional Record by Senator Goldwater at the time he introduced his bill, 105 Cong. Rec. 1283(3), II Leg. His. 979(2-3), states "This section amends section 302 of the Labor Management Relations Act, 1947, to extend its coverage to (1) any person acting in the interest of an employer (as well as by the employer himself) * * * and (2) to any employee or group or committee of employees for the purpose of interfering," etc.

The analysis prepared by Senator Goldwater and inserted in the Congressional Record on October 2, 1959, II Leg. His. 1853(3) describes Section 505 as amending 302(a) "to apply also to employer association * * * the prohibition is extended also to payments * * * to * * * officers."

[5] A comparison of the administration bill S. 748 and the Kennedy-Erwin bill describes each as amending Section 302, 105 Cong. Rec. 1290(1-2), II Leg. His. 986(1-2) "to broaden the category of prohibited payments."

Congressman Griffin in his analysis of the Landrum-Griffin bill, II Leg. His. 1521(3) states that the amendment revises Section 302 "so as to broaden the prohibitions in existing law * * * the prohibitions are extended to payments * * * to union officers * * * for the purpose of influencing them in their capacity as such."

[6] Congressman Elliott in his analysis of the committee bill, II Leg. His. 1586(2) states that Section 505 "adds to the existing proscription of section 302(a) the prohibition that the employer * * * not pay * * * to any officer * * * of any labor organization * * * with

This Court has always taken the amendment by Congress of a statute as proof that the prior statute should be given a different meaning. *United States* v. *Chase,* 135 U.S. 255, 262; *Vierick* v. *United States,* 318 U.S. 236, 247; *United States* v. *Curtis,* 107 U.S. 671, 676; *Sarlls* v. *United States,* 152 U.S. 570, 577; *United States* v. *Weitzel,* 246 U.S. 533. Hence the court below was departing from well established precedents of this Court when it held that an association of employers was an employer under the original Act because it must have been an agent of its employer members and Donovan must have been a representative because he was the president of the local.

4) In viewing the pre-1959 language as not covering a union officer as such without proof that he was a representative, Congress was aware of the actual realities of labor union organization in the United States. Many union officers do not act as the representative of the union's members in dealings with employers. The trend away from bargaining by locals and towards bargaining on a regional district or national level has progressed so far in the United States that many authors regard a local president who has representation powers as the exception rather than the rule.[7] For the court below to hold that a local president must be assumed to be a representative

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Footnote 6 Continued

intent to influence him with respect to his actions * * * as a representative of employees."

Congressman King inserted in the Congressional Record, II Leg. His. 1790(3), an analysis of Section 505 which describes it as making the prohibitions of the Taft Hartley Act "applicable to * * * employer associations."

without any proof, not only ignored the Congressional view that officers as such were not covered by the pre-1959 language, but was contrary to accepted facts of industrial life.

5) The Court of Appeals could not have been correct in holding that the pre-1959 statutory proscription of all payments to "representatives of employees" included payments to officers of unions, as such. As above noted, the 1959 amendments were continuously and consistently described as "expanding," "extending," "broadening" and "adding" (*cf. supra,* footnotes 3, 4, 5 and 6). The 1959 amendments which did not change the prohibition against payments to "representatives of employees," added a prohibition against payment to officers of unions. However, the amendments did not prohibit all payments to all officers of unions. Specifically, it limited the proscribed payments to officers to the circumstances described in subsections 2 and 4 of Section 302(a). If, as held by the Court of Appeals, the pre-1959 statute proscribed all payments to union officers, then the 1959 amendments could only be construed as reducing or curtailing the scope of prohibited payments. Thus, the holding of the Court of Appeals yields an irrefutable conclusion that its interpretation cannot be

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[7] William M. Leiserson, American Trade Union Democracy (Columbia, 1959) pp. 288, 317, 318; John T. Dunlop, Structural Changes in the American Labor Movement and Industrial Relations System, reprinted Walter Galenson, Labor and Trade Unionism (1960), pp. 110-111; Jack Barbash, Unions and Union Leadership, Harpers, 1959, pp. 99-100, 178, 180, 185; Arnold Robert Heber, Union Decision Making in Collective Bargaining: A Case Study on the Local Level, Institute of Labor and Industrial Relations, University of Illinois, 1951, p. 41.

correct, because clearly, as above noted Congress specifically "expanded", "extended", "broadened" and "added" the area of prohibited payments; it did not intend to reduce or curtail said area.

With respect to the question of whether the pre-1959 language may be construed to cover the same persons as were added by the 1959 amendments, this case presents issues necessarily involved in consideration of the first question presented in *Roth* v. *United States*, No. 234, this Term, petition pending, where the Court of Appeals for the Second Circuit (333 F. 2d 450, at p. 453) held that the pre-1959 language embraced a loan although no express language referring to a loan was in the statute prior to the 1959 amendment.

6) The Court of Appeals for the Seventh Circuit interpreted this Court's opinion in *United States* v. *Ryan*, 350 U.S. 299 as creating a fact presumption that holding union office constitutes "representation." This Court should review the decision below to correct this erroneous interpretation. This Court did not hold, as the court below construed the decision (p. 15a, *infra*), that the president of a local must by reason of his office be regarded as having some authority to act for his members in dealings with their employers. This Court there stated (350 U.S. at 301):

> "We do not decide whether any official of a union is *ex officio* a representative of employees under §302."

In that case, this Court held Ryan, who was the international president of The International Longshoremen's Association, was a representative within the meaning of the statute because "he was a member of its wage scale

committee and signed all negotiated agreements" (350 U.S. at p. 301).

There was, of course, no evidence here at all that Donovan as local president or otherwise had either the authority to act, or had in fact, ever acted, for any members of Local 755 in any respect. There was no showing he was a member of any negotiating committee. There was no evidence the local was the bargaining agent for any employees. There was no evidence Donovan had ever signed any agreements. Indeed the record was completely devoid of any evidence to show Donovan was a representative. The Court of Appeals relied only on the *ex officio* status which this Court specifically refrained from adopting in the *Ryan* case.

7) If the Court of Appeals was correct that the pre-1959 statute proscribed payments to officers of unions to the same extent as it proscribed payments to "representatives of any employees," then the 1959 amendments must be held to have repealed the previous broad all-inclusive prohibition, leaving in operation only the payments to officers proscribed under Subsections 2 and 4 of Section 302(a) of the Act, as amended. In this event the decision of this Court in *Hamm* v. *City of Rock Hill,* 379 U.S. 306, appears to require reversal of the convictions sustained by the Court of Appeals in this case. This Court there held that the common law rule that repeal of a statute acts as remission of penalties is still in effect in the federal courts (379 U.S. at p. 312-313). "The reason for the rule" was quoted (379 U.S. at p. 313) from Chief Justice Hughes in *Chambers* v. *United States,* 291 U.S. 217, at p. 226, as follows: "Prosecution for crimes is but an application or enforcement of the law and if the prosecution continues

the law must continue to vivify it." This Court also pointed out that the common law rule imputes to Congress "an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose, and would be unnecessarily vindictive" (379 U.S. at p. 313).

The federal savings statute, 61 Stat. 635, 1 U.S.C. 109, was construed by the Court in the *Hamm* case as "meant to obviate mere technical abatement," 379 U.S. at p. 314. The narrowing of instances in which payments to union officers are illegal, assuming the original act made all payments to union officers illegal, is not a "mere technical abatement such as that illustrated by the application of the rule in *Tynen* decided in 1870" (cf. *Hamm,* 85 Sup. Ct., at p. 390). It is a repeal of a prior broader prohibition. This Court has always recognized that the common law rule was that the repeal of a statute in whole or in part acts as a remission of all penalties. *United States* v. *Reisinger,* 128 U.S. 398, 401; *Norris* v. *Crocker,* 54 U.S. (13 How.) 429, 438-439, 440; *Yeaton* v. *United States,* 9 U.S. (5 Cranch) 281, 283.

Tested by the rule of the *Hamm* case it seems obvious that the indictment Counts 2 through 47 are equally as invalid as Counts 48 through 74. Counts 2 through 47 are in all respects here material the same as Counts 48 through 73, differing only as to dates and amounts. The Court of Appeals tested Counts 48 through 74 by the presently effective statute and found them defective, because the presently effective statute differentiated between different types of payments to different types of payees, and the indictment when read alongside of the statute assumed a disjunctive form lacking in the certainty required to inform an accused of the crime with which he was charged. If the pre-1959 statute did embrace payments to officers of

unions as such, then the differentiating language in the amendment repealed the nondifferentiating language of the pre-1959 act. Hence under the rule in the *Hamm* case Counts 2 through 47 had to be tested by the 1959 amendments. Just as Counts 48 to 74 could not meet the test of the 1959 amendments, Counts 2 to 47 being identical are equally invalid.

While the petitioner did urge in both the district court (App. 15-16) as well as in the Court of Appeals (see opinion of Court of Appeals, (p. 8a, *infra*) that all the counts in the indictment were equally defective in being uncertain and indefinite, petitioner construed the earlier statute as not embracing payments to officers as such, and did not argue the repeal argument now made in view of the *Hamm* case. The judgment below was entered on November 3, 1964 and the *Hamm* case was not decided until December 14, 1964. The intervening decision of this Court excuses the failure to raise this point below.

CONCLUSION.

For the foregoing reasons it is respectfully urged that this Court grant a writ of certiorari and reverse the judgment below.

Respectfully submitted,

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APPENDIX A

The pertinent provisions of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. 140, *et seq.*, are as follows:

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relation Act is hereby amended to read as follows:

* * * * *

"DEFINITIONS

"SEC. 2. When used in this Act—

* * * * *

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholders or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic

service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

• • • • •

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

SEC. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

The pertinent provisions of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401, *et seq.*, are as follows:

AMENDMENT TO SECTION 302, LABOR MANAGEMENT RELATIONS ACT, 1947

SEC. 505. Subsections (a), (b), and (c) of section 302 of the Labor Management Relations Act, 1947, as amended, are amended to read as follows:

"SEC. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

"(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

"(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

"(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

"(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

"(b) (1) It shall be unlawful for any person to request, demand, receive or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)."

APPENDIX B

JUDGMENT ENTERED IN UNITED STATES DISTRICT COURT

United States District Court.
For the Northern District of Illinois,
Eastern Division.

United States of America,
vs.
Edward J. Donovan
} No. 61 CR 496.

On this 23rd day of August, 1963 came the attorney for the government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of accepting sums of money and an automobile from United Film Carriers, Inc., an employer of employees represented by the defendant, in violation of Section 186(b), Title 29, United States Code, as charged in Counts 2 to 74, both inclusive, of the indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year on Each of Counts 2 to 47, both inclusive, said sentences to run concurrently with each other.

It Is Further Adjudged that the defendant is hereby committed to the custody of the Attorney General or his representative for imprisonment for a period of One (1) Year on each of Counts 48 to 73, both inclusive, said sentences to run concurrently with each other, and consecutively to the sentence imposed on Counts 2 through 47.

It Is Further Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year and forfeit and pay to the United States of America a fine in the amount of Five Thousand Dollars ($5,000.00) on Count 74 of the indictment, said sentence of imprisonment imposed on Count 74 to run consecutively to the sentence imposed on Counts 48 through 73.

It Is Further Ordered that the bond of the defendant remain at the sum of $3,000.00 pending appeal by the defendant.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

August 23, 1963.

Bernard M. Decker,
United States District Judge

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1964 — September Session, 1964
No. 14410

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

EDWARD J. DONOVAN,
Defendant-Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 3, 1964

Before Duffy, Knoch and Castle, Circuit Judges.

Castle, Circuit Judge. Edward J. Donovan, defendant-appellant, prosecutes this appeal from his conviction, following a jury trial in the District Court, on a multiple count[1] indictment for violation of 29 U.S.C.A. §186(b).

Counts 2 through 47 concern payments of money alleged to have been received and accepted by the defendant during each of the calendar months of the year 1958, and in March 1959, from United Film Carriers, Inc.[2] The period covered by such counts antedates the September 14, 1959, amendment of Section 186. In so far as pertinent to the

[1] Count 1 was dismissed before trial on the remaining 73 counts.

[2] Hereinafter referred to as "United".

issues presented by this appeal, these counts charge[3] in substance that during all of the period involved United was an unincorporated association of named persons and firms engaged in the motion picture film delivery business, an industry affecting commerce; United was the agent of said named employers; both United and its member employers employed members of Local 755,[4] a labor organization; and that the defendant was an official of Local 755 and a representative of the employees employed by United and its member employers.

Counts 48 through 73 concern similar payments alleged to have been received and accepted by the defendant on dates in 1959 and 1960, which are subsequent to the 1959 amendment to Section 186, and incorporate by reference pertinent paragraphs of Count 1 but omit the allegation that United was the agent of the named employers. Count 74 differs from Counts 48 through 73 only in that a subsequent 1960 date, and receipt and acceptance of an automobile rather than a payment of money, are alleged.

The defendant was sentenced to imprisonment for a period of one year on each of Counts 2 through 47, said sentences to run concurrently; to imprisonment for one year on each of Counts 48 through 73, said sentences to run concurrently with each other and consecutively to the sentence imposed on Counts 2 through 47; and to imprisonment for one year and a fine of $5,000 on Count

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[3] By incorporating by reference the first six paragraphs of Count 1.

[4] The Film, Radio, Television, Orchestra, Studio, Theatrical, Exhibition, Amusement Park and Sound Truck Chauffeurs, Helpers and Warehousemen, Local Union 755 International Brotherhood of Teamsters.

74, the sentence of imprisonment to run consecutively to the sentence imposed on Counts 48 through 73.

The defendant predicates his request for reversal of the judgment order of conviction and sentence upon contentions which include his assertion the trial court committed reversible error in denying his motions assailing the indictment as not, in any of its counts, charging a crime; the insufficiency of the evidence to support a conviction on any count, including that arising from failure of the government to overcome the application of the employment exception contained in §186(c); the charges sought to be proved constituted, in any event, but one offense rather than seventy-three; failure to properly restrict the scope of the re-direct examination of a government witness; error in the giving and refusal to give instructions; and prejudicial misconduct of the prosecutor in the course of his argument in summation. Some of these contentions present more than one facet and encompass subsidiary arguments advanced in support thereof. We elect to limit this opinion to a detailed discussion of only those factors and arguments which after deliberate consideration we have found to merit expository analysis and to require comment.

The statutory provision upon which Counts 2 through 47, which counts encompass only pre-September 1959 status and conduct, are grounded provided that:

> "(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value."

The section of the statute (29 U.S.C.A. §186) of which the above quoted prohibition was a part was amended September 14, 1959, so as to provide in pertinent part as follows:

"(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any

money or other thing of value prohibited by subsection (a) of this section."

The amendment, for the first time, expressly brought an "association of employers", as such, within the ban of the activities denied employers. The amendment, among other things, had the effect of measuring the prohibitions of paragraph (b) by reference to the conduct proscribed by paragraph (a) as applied to one who was the solicitor or recipient of the forbidden payment, loan, etc. In view of the dates alleged therein, Counts 48 through 74 of the indictment must find their basis in the provisions of the statute as so amended.

We perceive no merit to defendant's contention that the express inclusion of "association[s] of employers," as such, by the 1959 amendment demonstrates the failure of Counts 2 through 47 to charge a crime—such counts relating, as they do, to pre-September 1959 conduct—and that the convictions thereunder are invalid as being ex post facto. In Counts 2 through 47 it is alleged United was an association of employers but it is additionally alleged it was the agent of such member employers and also an employer of Local 755 members in its own right. And, the term "employer" as used in §186(b) prior to its amendment was defined (29 U.S.C.A. §152(a)) as including "any person acting as an agent of an employer, directly or indirectly, . . .".

Defendant's supplemental motion to dismiss the indictment, which was denied, assailed Counts 48 through 74 as violative of the Sixth Amendment, for failure to apprise the defendant of the nature and cause of the accusation against him. In its brief the government recognizes that the amended §186, upon which Counts 48 through 74 are grounded, in its "subsection (a) lists several specific classes that are forbidden to pay, lend or deliver any

money or thing of value to any of the individuals, organizations or classes listed in subdivisions (1), (2), (3) and (4) under the circumstances contained therein'' and that ''[s]ignificantly, all of the subdivisions are separated by the disjunctive conjunction 'or' ''. Furthermore, this series of counts charge the defendant was both an ''official of Local 755'' and a ''representative of the employees'' employed by United and by United's member employers. Amended §186(a) delineates four distinct courses of conduct each of which is declared unlawful and constitutes an offense when engaged in by any of the specific classes against whom the section's prohibitions are directed. The prohibitions of §186(b), as amended, are directed against one who solicits or is the recipient of the conduct proscribed to others by §186(a). Apart from the possible interpretation that Counts 48 through 74 may be taken to charge the defendant with being the recipient in connection with conduct proscribed to United and its member employers by subsection (3) of §186(a) it is apparent the defendant is unable to determine from the language of these counts whether he is being charged as a union official with being the recipient with reference to conduct violative of subsection (2), or of subsection (4); or being charged as a representative of employees with being the recipient with reference to conduct violative of subsection (1). It is readily apparent that this series of counts does not apprise the defendant with reasonable certainty of the accusation against him.

It is an elementary principle of criminal pleading that where the definition of an offense employs generic terms it is not sufficient to charge the offense in such generic terms but the indictment must state the species—it must descend to particulars. *Russell* v. *United States*, 369 U.S. 749, 765. The basis upon which this principle rests—

the necessity that the indictment inform the accused with reasonable certainty of the specific offense with which he is charged—is, in our opinion, equally applicable where the statute, as it here does, proscribes different types of conduct in the disjunctive. In this connection the observation made in *Ackley* v. *United States*, 8 Cir., 200 F. 217, 221, is apposite. It was there stated:

> "To recite that the defendant did the one thing or another makes the indictment bad for uncertainty."

It is clear that an indictment which charges the accused, in the disjunctive, with being guilty of one or of another of several offenses, is destitute of the necessary certainty, and is wholly insufficient. It does not give the accused definite notice of the offense charged, and thus enable him to defend himself. And that is the effect of Counts 48 through 74. They fail to specify which of the several offenses embraced in amended §186 the defendant is accused of committing.

Had Counts 48 through 74 charged the defendant as a "representative of employees" only, the government's argument that such designation serves to identify and confine the offense charged by each of the counts to that of receiving and accepting a payment (or thing of value as to Count 74) which employers and certain others are proscribed from making by subsection (1) of amended §186(a), would not be without merit. But each of the counts in question also identifies and charges the defendant as "an official of Local 755."[5] Thus, as heretofore

[5] The identification of and charge that the defendant was an "official of Local 755" does not affect the validity or suffciency of Counts 2 through 47. As to those counts it is merely surplusage. §186(b) prior to its amendment in 1959 proscribed conduct of a "representative of employees" only.

pointed out, each count may also be taken as charging the receipt and acceptance of a payment proscribed by either subsection (2) or (4) of §186(a). The government's reliance upon *United States* v. *Debrow,* 346 U.S. 374, 376, is therefore misplaced. Counts 48 through 74 do not adequately meet the test of sufficiency applied in *Debrow.* Nor are the Federal Rules of Criminal Procedure, including Rule 7(c), of aid to the government here.

On this phase of the appeal we conclude that the defendant's convictions and sentences on Counts 48 through 74 must be reversed.

We turn to consideration of the sufficiency of the evidence, viewed in the light most favorable to the government, to support the convictions under Counts 2 through 47. A brief resume of the facts established by pertinent evidence will suffice as a background for consideration of this issue—further appraisal of the merits of defendant's contentions on this issue may be limited to those particular elements or factors with respect to which the defendant asserts the proof is insufficient.

It was stipulated that at all relevant times Local 755 was a labor organization; the defendant during the period involved held positions as an officer of the Local, including that of president; and from January through June of 1958 two members of Local 755 were in the employ of United, one of whom, Ralph J. McLaughlin, was at all times pertinent to the indictment employed by United as its office manager. The record discloses United was utilized by its members to synchronize their deliveries of motion picture film and supplies from various film exchanges to theatres—and from the theatres back to the exchange, to United, or to members for delivery to another theatre, as the case might be. United's members were "route

owners"—persons and firms engaged in the motion picture film delivery business. These route owners brought their theatre bookings to United. United saw to it that the proper film was delivered to and returned from the proper theatre at the scheduled time by the route owner or the route owner's driver. When required United had a man to make delivery of anything "short" to the place where needed. Some of the drivers employed by route owners were members of Local 755. The defendant received and accepted 46 payments of money from United during 1958, and one such payment in March of 1959, (the period covered by Counts 2 through 47). The payments were made by checks delivered to the defendant. For the most part they were in the same or similar amount and reflected deductions for income tax withholdings, social security contributions and hospitalization insurance.

The record clearly demonstrates that the member route owners utilized United as their agent in carrying out an essential feature and integral part of the business in which each of the route owners was engaged. United synchronized and facilitated the deliveries its members undertook to make for the purpose of assuring that such deliveries were made in accordance with the schedule the members were to meet. This agency on behalf of the employer-members, and the fact that United itself was also an employer of members of Local 755, brought United within the purview of §186(b)[6] as an employer from whom a representative of the employees of United and its member route owners was prohibited from receiving or accepting any money or thing of value. We perceive no merit to the defendant's contentions that the agency requisite to effect

[6] This reference to §186, and those that follow, are to the Section as it existed prior to the 1959 amendment.

such a result must be an agency for the purpose of labor-management relations matters, such as negotiating or executing collective bargaining agreements, and that the defendant was not a representative of employees because it was not expressly shown that he had authority to act in collective bargaining matters. The intent and purpose of the statutory prohibitions here involved would be frustrated by such a narrow construction of the statute. For the purpose of this particular section of the statute we perceive no basis for so restricting the scope of the terms "agent" and "representative." Normally, a labor organization acts only through its officers—and certainly one holding the office of president of such an organization must be regarded to have some authority to act for employee-members of the labor organization in dealings with their employers. Such a conclusion, we believe, comports with the rationale of *United States* v. *Ryan*, 350 U.S. 299, and *Brennan* v. *United States*, 8 Cir., 240 F. 2d 253.

During the period covered by Counts 2 through 47 it was provided under paragraph (c) of §186 that the prohibitions of the section:

> ". . . shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer: . . ."

The jury was properly instructed with respect to the effect of this exception and as to the government's burden of proof where evidence is produced which tends to show employment in such exempt status. Defendant points out that the notations made by United in the normal and ordinary course of its business indicating deductions for tax

and insurance purposes in connection with the payments to the defendant was evidence tending to establish an employment relationship between defendant and United which afforded him an exempt status under the exception contained in the statute; asserts there is supporting evidence of such a relationship in testimony concerning the defendant's activities; and contends the government did not overcome the application of the exception by proof establishing beyond a reasonable doubt the nonexistence of an employment relationship. The government concedes the general proposition that once competent evidence has been produced which tends to bring a defendant within the exception it then becomes incumbent upon the prosecution to negative the applicability of such exception beyond a reasonable doubt. It points to the testimony of route owners and of United's office manager, McLaughlin, as negating the performance of any services by the defendant for United. The evidence of this actual issue, viewed in the light most favorable to the government, warranted a conclusion by the jury that no employment relationship between the defendant and United was involved and that the payments involved were not, as defendant contends, salary or compensation for services rendered by the defendant; that, in fact, Donovan performed no service for United. The question was a factual one for resolution by the jury. We do not on review weigh the credibility of the witnesses. Moreover, the testimony upon which defendant relies is either hearsay, shown to be based on unfounded assumption, or otherwise lacking in probative value on the issue as to whether Donovan performed any services for United. Crediting the testimony favorable to the government, the jury was warranted in concluding that no bona fide employment relationship existed.

The defendant argues that the receipt of the monies charged in Counts 2 through 47 of the indictment constitutes but one offense—not separate violations of the statute. In *United States* v. *Keegan*, 7 Cir., 331 F. 2d 257, 260, this Court speaking through Chief Judge Hastings, held that §186(b) was not merely directed against a course of conduct but prohibited receipt of each payment received in violation of its provisions. We there endorsed the rationale of *United States* v. *Alaimo*, 3 Cir., 297 F. 2d 604, and treated it as dispositive of such issue. Our holding in *Keegan* is controlling here. Moreover, there is nothing in the evidence to support the conclusion defendant urges upon us. There is nothing to indicate, much less establish, that the numerous payments during the fifteen months involved were but parts of one transaction, installments of a pre-arranged amount, or the result of a single impulse. There were individual receipts of money from United over many months, and each time the defendant received and accepted a check he was doing that which the statute forbade.

The defendant complains of two instructions given by the trial court. One relates to the "engaged in an industry affecting commerce" factor of the offense proscribed by the statute. The other concerns the "wilfully violates" element requisite to establish the offense charged. The first mentioned instruction is substantially identical with that specifically approved by this Court in *United States* v. *Gibas*, 7 Cir., 300 F. 2d 836, 839. The second is identical with that approved in *United States* v. *Keegan, supra*, pp. 261-262. There was no error in the instructions so given—and as the subjects were covered by proper instructions it was not error to refuse those tendered by the defendant on the same subjects. It is unnecessary that

we discuss them. Likewise, we are unpersuaded by defendant's argument that the government failed to prove a "wilful violation" by the defendant.

The scope and content of the re-direct examination of government witness McLaughlin was not, as defendant contends, improper under the circumstances presented. It was within the bounds of legitimate re-direct examination to clarify statements elicited from the witness on cross-examination—to show that the answers the witness gave were based on hearsay or unfounded assumption. Although a colloquy in the presence of the jury and the form of some of the prosecutor's questions betrayed his unfavorable attitude toward and displeasure with the witness we find in the incidents involved nothing reaching the proportion of prejudicial error requiring reversal. And, the same observation is equally applicable to the defendant's claim of misconduct of the prosecutor in the course of his summation to the jury. Moreover, defendant neither interposed an objection to the statement chiefly complained of, that the president of United was not called as a witness "because he never witnessed Donovan's doing anything [for United]," nor moved for a mistrial on account thereof. While the statement was improper it was not regarded of such import at the time as to elicit an objection from defense counsel—which, no doubt, would have prompted an instruction by the court that the jury disregard the comment. Nor did it so impress the able and experienced trial judge as to provoke an unsolicited instruction. Defendant is not in a position now to complain of this alleged error. Cf. *United States* v. *Wright*, 7 Cir., 309 F. 2d 735, 738; *Gerard* v. *United States*, 7 Cir., 61 F. 2d 872, 875.

We are not persuaded by the contentions of the defendant relating to the issues we have discussed in connection with the convictions under Counts 2 through 47 and although we have considered the additional and subsidiary arguments defendant advances, and the authorities cited and relied upon in connection therewith, we are of the view that none of them merit that we extend this opinion to discuss them.

The judgment order of the District Court is affirmed as to the convictions and sentences on Counts 2 through 47 of the indictment but reversed as to the convictions and sentences on Counts 48 through 74, and the cause is remanded to the District Court with instructions to vacate the sentences imposed on the defendant, Edward J. Donovan, under Counts 48 through 74 of the indictment.

Affirmed In Part, Reversed In Part, And Remanded With Directions

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX D

United States Court of Appeals
for the Seventh Circuit

Tuesday, November 3, 1964
Before
Hon. F. Ryan Duffy, Circuit Judge
Hon. Win G. Knott, Circuit Judge
Hon. Latham Castle, Circuit Judge

United States of America, Plaintiff-Appellee, vs. Edward J. Donovan, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 14410	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment order of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED as to the convictions and sentences on Counts 2 through 47 of the indictment but reversed as to the convictions and sentences on Counts 45 through 74, and that this cause be and it is hereby REMANDED to the District Court with instructions to vacate the sentences imposed on the defendant, Edward J. Donovan, under Counts 48 through 74 of the indictment, in accordance with the opinion of this court filed this day.

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois, 60610

Monday, January 4, 1965

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

United States of America, Plaintiff-Appellee, No. 14410 vs. Edward J. Donovan, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for rehearing of this cause filed herein on November 17, 1964, by defendant-appellant, and the petition for rehearing filed herein on November 13, 1964, by plaintiff-appellee, be, and the same are hereby DENIED.

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 962

EDWARD J. DONOVAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 6–19) is reported at 339 F. 2d 404.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1964 (Pet. App. 20), and a petition for rehearing was denied on January 4, 1965 (Pet. App. 21). On January 27, 1965, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including March 5, 1965, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction for accepting money from an association of employers of members of his union, which acted as an agent of its employer-members and also employed members of the union in its own right, constituted an *ex post facto* application of Section 302(b) of the Labor Management Relations Act, as amended.

2. Whether petitioner, to whom the treasurer of the union delivered the union dues received by him, and who had the responsibility of bargaining with employers on the union's behalf, was a "representative of * * * employees" within the meaning of Section 302(b).

STATUTES INVOLVED

The relevant provisions of Sections 302 and 501 of the Labor Management Relations Act of 1947, of Section 302 as amended by Section 505 of the Labor-Management Reporting and Disclosure Act of 1959, and of Section 2 of the National Labor Relations Act, as amended, appear in the Appendix, pp. 11–13, *infra*.

STATEMENT

Counts 2–47 of a 74-count indictment (A. 11–15),[1] filed September 27, 1961, in the United States District Court for the Northern District of Illinois (A. 9), charged petitioner, a labor union official, with having received from United Film Carriers, Inc. ("United"),

[1] "A." refers to the certified appendix record filed with the petition for a writ of certiorari. "Tr." refers to the reporter's transcript, which, at our request, has also been certified and lodged with the Clerk.

an employer of such employees, 46 payments of money between January 1958 and March 1959, in violation of Section 302(b) of the Labor Management Relations Act of 1947. Counts 48–73 charged that he received 26 additional money payments from United between December 1959 and July 1960, in violation of the section as amended by the Labor-Management Reporting and Disclosure Act of 1959 (pp. 11–12, *infra*). Count 74 charged that he accepted an automobile from the same firm in February 1960, also in violation of amended Section 302(b). Following a trial by jury, petitioner was convicted on all of the foregoing counts (A. 10).[2] He was sentenced to one year's imprisonment on each of counts 2–47, to run concurrently, to one year's imprisonment on each of counts 48–73, to run concurrently with one another but consecutively to the sentences on counts 2–47, and to one year's imprisonment on count 74, to run consecutively to the sentences on counts 48–73—a total of three years. In addition, he was fined $5,000 on count 74 (A. 10, 141–142). The court of appeals affirmed as to counts 2–47, but reversed as to the remaining counts (Pet. App. 19, 20).

The evidence adduced by the government, so far as germane to the issues raised by the petition, may be summarized as follows:

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[2] Count 1, which charged petitioner, another individual, and United with conspiracy to violate Section 302, was dismissed before trial on motion of the government (A. 9, 10) and is no longer involved.

Throughout the pertinent period, United was an unincorporated association[3] of persons and firms engaged in the business of delivering motion picture films in and around Chicago. The member individuals and firms, who were known as "route owners," transported the films from the Chicago offices of their producers (knowns as "film exchanges") to the area theaters where they were exhibited, and thereafter returned them to the exchanges, or transferred them from one theater to another. It was United's function to synchronize these deliveries for its members, for which it received a weekly payment of $2.70 from each member for each theater serviced (A. 21–23; Pet. App. 7, 13–14).

Petitioner was president of the Film, Radio, Television, Orchestra, Studio, Theatrical, Exhibition, Amusement Park and Sound Truck Chauffeurs, Helpers and Warehousemen, Local Union 755, International Brotherhood of Teamsters ("the Union"), whose members included employees of the route owners as well as the employees (two in number) of United. Ralph McLaughlin, one of the two latter employees, was United's office manager and dispatcher. He was secretary-treasurer of the Union during the relevant period and in addition was a route owner himself.[4] As a route owner, McLaughlin personally employed five drivers, each of whom was a member of the Union. The drivers paid their Union

[3] Our files indicate that the group was at one time incorporated, which presumably accounts fo the "Inc." in the name by which it is referred to in the record.

[4] Though a route owner, McLaughlin was not a member of United during the pertinent period (A. 39).

dues to McLaughlin, who turned the money over to petitioner (A. 20–23, 38; Pet. App. 7, 13–14). During the pertinent period it was petitioner's responsibility, according to McLaughlin, to bargain with employers on behalf of the Union (Tr. 29).[5]

Between January 1958 and March 1959 petitioner received from United 46 sums of money (the payments underlying counts 2–47), ranging in size from $47.10 to $390 and totaling approximately $5,500. Between December 1959 and July 1960 he received 26 additional sums (counts 48–73), ranging from $74.75 to $111.38 and totaling about $2,300.[6] Many of the checks by which these payments were made bore notations on their reverse sides indicating that they were "salary" payments, and purporting to reflect deductions by United for income tax withholdings, social security contributions, and hospitalization insurance. Although there was some testimony that petitioner had performed services for United, the jury's verdict—under appropriate instructions—must have been based upon a finding that petitioner had not been a *bona fide* employee of United during the pertinent period and had performed no services for the association (A. 23, 129–131, 133–134, 164–167; cf. A. 30–33).

The court of appeals reversed petitioner's convictions on counts 48–74 on the ground that the indictment failed to specify which clause of Section 302(b), as

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[5] With respect to this last-mentioned testimony, see note 8, *infra*.

[6] There is no occasion to detail the evidence on count 74, charging the receipt of an automobile, in view of the court of appeals' reversal as to that count.

amended, had allegedly been violated and that it therefore failed adequately to apprise petitioner of the nature of the accusations (Pet. App. 10–13). It affirmed the convictions on the remaining counts.

ARGUMENT

1. There is no substance to petitioner's contention (Pet. 3, 12, 13, 15) that his conviction on counts 2–47 involved an *ex post facto* application of Section 302 (b), as amended in 1959. Petitioner's argument is that United, the maker of the payments charged in those counts, was acting solely as an association of employers, and that such associations (as distinguished from employers themselves) were first brought within the purview of the section by the 1959 amendment. But counts 2–47 charged that United was an agent of its member persons and firms, and the evidence supported this allegation (A. 12, 13, 22). "[E]mployer," as used in Section 302(b), has always been defined to include "any person acting as an agent of an employer, directly or indirectly"—and the word "person[s]" has always included "associations." See pp. 12–13, *infra*. Thus United was an employer within the literal terms of the unamended Section 302(b). Furthermore, United, in addition to being an agent of its constituent members, was an employer of members of the Union in its own right (p. 4, *supra*), as the opinion below points out (Pet. App. 10).

2. Petitioner also contends (Pet. 2, 8, 12–18) that since the 1959 amendment expanded the categories of persons forbidden to receive payments to include (in certain circumstances) "any officer" of "any labor

organization,"[7] Congress could not have intended the words "any representative of any employees" (the only class of persons prohibited from accepting payments prior to the amendment) to include individuals such as petitioner—as to whom, petitioner contends, the only evidence as to "representative" status was that he was president of a union to which the employees belonged.

The premise of this argument—that the only evidence that petitioner was a representative of employees was the fact that he was president of the Union—is erroneous. McLaughlin testified that he regularly turned over to petitioner the dues paid to him by members of the Union (A. 22, 38). This evidence certainly tended to show that petitioner was the chief power in the Union in fact as well as in name. Moreover, it was petitioner's responsibility, according to McLaughlin, to bargain with the employers on the Union's behalf (Tr. 29).[8] This case is thus substan-

[7] § 302(a) (2) and (4), as incorporated by reference in amended § 302(b)(1) (pp. 11–12, *infra*).

[8] Petitioner contended in the court of appeals (at p. 12 of his reply brief) that the latter testimony of McLaughlin was not properly part of the record—for the reason that it consisted of an answer by McLaughlin to a question by government counsel to which the court had sustained an objection. And in this Court he argues that the record "is devoid of any evidence that petitioner Donovan was authorized to or did act as a representative of any employees in dealing with their employer" (Pet. 8)—thus, in effect, renewing this contention. The court of appeals, in holding that it had been adequately shown that petitioner had been a representative of employees within the meaning of the statute, remarked that it made no difference that "it was not expressly shown that he had authority to act in collective bargaining matters" (Pet. App. 15). While the court of appeals thus found it unnecessary to rely on the testi-

tially governed, we submit, by *United States* v. *Ryan*, 350 U.S. 299, holding (in a case arising prior to the 1959 amendment) that the phrase "any representative

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mony in dispute, it is clear that the trial court (whose ruling was the subject of the dispute) did not agree with petitioner that the evidence was not properly part of the record. The relevant facts concerning the admission of this testimony are as follows:

McLaughlin was asked by government counsel on direct examination (Tr. 29):

"Q. During the period 1958 through 1960, whose responsibility was it to bargain on behalf of Local 755 with the employers of the members of Local 755, * * * if you know?"

The following then occurred (*ibid.*):

"Mr. CALLAGHAN [defense counsel]: I object to that as calling for a conclusion, as to what someone's responsibility was.

"The COURT: He may testify as to what the defendant may have done during this period, but as to whose duty it was, he may testify as to any facts that he has of his personal knowledge as to what the defendant did or did not do.

"By the witness:

"A. Mr. Donovan."

No motion was made, then or later, to strike the witness' answer.

Subsequently, during defense counsel's argument of a motion for judgment of acquittal, the court directed counsel's attention to the foregoing question by the prosecutor and the witness' answer. Counsel, in reply, asked the court to note the "interposing [*sic*] language," *i.e.*, counsel's objection and the court's ruling. The court said it was aware of the intervening exchange and, in response to counsel's further statement that the court had sustained his objection to the prosecutor's question, remarked that it did not "see another objection following the answer" (Tr. 514–516). Government counsel, during his argument of the motion, thereafter referred to, and in part relied on, the testimony in question—without comment by either the court or defense counsel (Tr. 532).

See, also, Tr. 653–655, where government counsel, by leave of the court and over the objection of defense counsel, referred to the testimony in dispute in his closing argument to the jury.

of any employees" in Section 302(b) included the president of, and principal negotiator for, a union. The fact that Congress, in 1959, broadened the coverage of the section to include *any* officer of *any* labor organization is immaterial.

Moreover, while this Court pretermitted in the *Ryan* case the question "whether *any* official of a union [emphasis added] is *ex officio* a representative of employees under § 302" (350 U.S. at 301), the Court pointed out that (*id.* at 302)—

> Considering the precise words of the statute—"any representative of any employees"—it is plain that their literal meaning strongly suggests that they were meant to include someone in the position of respondent Ryan who represented employees both as a union president and principal negotiator. * * *

This Court thus recognized that the occupancy by an accused of what is normally the highest office in a union is a most significant factor in determining whether he is properly to be deemed a "representative of" members of the union within the meaning of Section 302(b). The court below was right, therefore, in concluding, "Normally, a labor organization acts only through its officers—and certainly one holding the office of president of such an organization must be regarded to have some authority to act for employee-members of the labor organization in dealing with their employers" (Pet. App. 15). In any event, it is unnecessary for the Court in this case to reach or consider the question whether the occupancy of the presidency of a union is sufficient in itself to

warrant the inference that such officer represents the members of his union for purposes of Section 302(b). For here, as we have said, there was substantial additional evidence that petitioner was a "representative" in fact.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1965.

APPENDIX

STATUTES INVOLVED

Section 302 of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C. 186, provided in pertinent part prior to September 14, 1959:

> SEC. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.
>
> * * * * *

Effective as of September 14, 1959, the foregoing section was amended by Section 505 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 537, to read in relevant part (29 U.S.C. (Supp. V) 186):

> SEC. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

* * * * *

Section 501 of the Labor Management Relations Act of 1947, 61 Stat. 161, 29 U.S.C. 142, has at all relevant times provided:

SEC. 501. When used in this Act—

* * * * *

(3) The terms * * * "employer" * * * [and] "person" * * * shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

Section 2 of the National Labor Relations Act, 49 Stat. 450, as amended by Section 101 of the Labor Management Relations Act of 1947, 61 Stat. 137 (29 U.S.C. 152), has at all relevant times provided:

SEC. 2. When used in this Act—

(1) The term "person" includes one or more * * * associations; * * *.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, * * *.

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